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Netherlands International Law Review / Volume 24 / Issue 1-2 / May 1977, pp 232 - 241
DOI: 10.1017/S0165070X00016259, Published online: 21 May 2009

Link to this article: http://journals.cambridge.org/abstract_S0165070X00016259

How to cite this article:

W.G. Rabus (1977). A new Definition of the “Levée en Masse”?. Netherlands International Law Review, 24, pp 232-241 doi:10.1017/S0165070X00016259

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A NEW DEFINITION OF THE "LEVÉE EN MASSE" ?

by W.G. Rabus*

I

"The inhabitants of a territory not under occupation who on the approach of the enemy spontaneously take up arms to resist the invading troops without having had the time to organize themselves into regular armed units are entitled to be regarded as belligerents provided they carry arms openly and respect the laws and customs of war."¹

This definition of the *levée en masse* as "the spontaneous springing to arms of the population in defense of the country"², still valid today, is based on the idea of the French Revolution, embodied in the Proclamation of the National Convention of 16 August 1793 which, as regards the enfranchised citizen, laid down inter alia "tout citoyen est soldat quand il s'agit de combattre la tyrannie"³; a concept that stood in contradiction to the then current calculable "cabinet wars" conducted by the State, in which to the recruited subject used by the army, itself a tool of the State, was allocated only the role of a passive object, the remainder of the population being considered, in Ford's term, as "quantité négligable"⁴.

The fact that governments involved their populations in war efforts led to a "rediscovery"⁵ of the institution of the *levée en masse* which was finally codified at the Hague in the above mentioned compromise formula⁶ and, albeit without any expectations, incorporated in the Geneva Conventions of 1949.⁷

Several authors interpreted this institution as being an ignorant unruly crowd

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1. See art. 1, 2 Regulations respecting the Laws and Customs of War on Land 1907; M. Greenspan, *The Modern Law of Land Warfare* (University of California Press, Berkeley Los Angeles, 1950), p. 62, note 37: "This includes occupied territory which the enemy has evacuated, or where it has lost effective control, and which it is seeking to reoccupy; Trial of Bauer, et.al. (1954)."

2. Greenspan op.cit., p. 62.

3. W.J. Ford, *De volkenrechtelijke positie van verzetslieden* [The International legal position of Members of the Resistance] (Amsterdam: North Holland Publishing Co., 1955), p. 44.

4. Ford, op.cit., p. 44.

5. Compare F. Berber, *Lehrbuch des Völkerrechts*, II. Bd. *Kriegsrecht*, (München Berlin: Beck'sche Verlagsbuchhandlung, 1962), p. 145.

6. In the text of 1899 the requirement of "si elle porte les armes ouvertement" is not included.

7. Art. 13(6) Ist and IIInd Convention, art. 4A(6) IIIrd Convention.

waving pitch forks about and throwing hot tar around ⁸, which must be brought to submission by the use of the disciplined military force of the adversary. All of which leads to there being very little significance attached to the institution.⁹ However, with an eye to the role that popular resistance plays in the armed conflicts of our own time, the question arises as to whether it is desirable that this public law institution should be allowed to fade into obscurity, as its existence could be of essential significance for a citizen involved in such resistance. In the event of being taken captive a citizen with the status of a combatant enjoys the protection laid down in the 3rd Geneva Convention of 1949. Without such status he loses his position as a protected citizen on the basis of the 4th Geneva Convention of 1949 and as a non-privileged combatant is susceptible to the possibility of being sentenced to death.¹⁰

When one follows the development of the concept of *levée en masse* as described by Ford ¹¹ the basic principle of the right of the citizen to "repousser la violence" and to "se défendre contre l'attaque inopinée des étrangers" ¹² comes to the forefront.

In the 17th and 18th centuries the role of the subject in the armed activities of the State was in increased measure transferred to the apolitical professional soldier.¹³ There was no place for the *levée en masse* in this division of tasks.

In the 19th century we see how by reason of democratic, nationalistic and military considerations a collective initiative of the population is once again considered to be an acceptable form of warfare.

This is apparent from the Prussian "Landsturm" ordinance of 1813, based on the ideas of Stein and Scharnhorst, which states in para. 1 that the offering of resistance against the advancing enemy must be seen as the duty of every citizen.¹⁴

Yet the peoples' revolt in Tyrol against the expansion endeavours of the French Empire in 1810 ended with the shooting of Andreas Hofer as a consequence of the attitude of the then great power France, "dass alle Tiroler, die mit Waffen versehen, gefangen, erschossen und aufgehängt werden . . .".¹⁵ Thus there is

8. Compare Berber, op.cit., p. 145.

9. Compare Berber, op.cit., p. 146; J.H. Schmid, *Die völkerrechtliche Stellung der Partisanen im Kriege*, (Zurich, 1956), p. 136; A. Steinkamm, *Die Streitkräfte im Kriegsvölkerrecht*, (Würzburg: Holzner Verlag 1967), p. 241.

10. See Greenspan, op.cit., p. 63, 64.

11. Ford, op.cit., p. 44 et seq.

12. M. de Vattel, *Le droit des gens ou principes de la loi naturelle*, 1758, Liv. III, chap. XV, par. 223, p. 197; see also Liv. III, chap. IV, par. 49, p. 295 (*The Classics of International Law*, Washington: Carnegie Institution, 1916); Compare also e.g. F. Suarez, *De Triplice virtute theologica, Fide, Spe et Charitate*, 1621, Disp. XIII: On War, Sect. 14, (Washington: Carnegie Institution, 1944, p. 802); H. Grotius, *De jure belli ac pacis libri tres*, 1646, Book II, chap. I, XXV (Washington: Carnegie Institution, 1925); F. de Victoria, *De Indis et de jure belli relectiones*, 1696, p. 410, pt 3, p. 422 sec. quast. (Washington: Carnegie Institution, 1917, p. 163, 167).

13. Compare Q. Wright, *A Study of War*, (Chicago London: The University of Chicago Press, 1965), p. 295.

14. Compare Ch. Meurer, *Die Haager Friedenskonferenz*, 11e Bd, *Das Kriegsrecht der Haager Konferenz* (München, 1907), p. 67.

15. Compare Meurer, op.cit., p. 66.

nothing to be found here of the view cited at the beginning of this article of the civilian as a soldier who should then also be treated as such.

The Lieber Instructions of 1863, expressing the opinion of the United States, confirm in Art. 51 the right of self-defense of the population. However, it must be realised that this is a derived and interim right, based on the authorisation of the Sovereign and only valid during the hostile attack. This authorisation also offers the possibility to introduce control in order to avoid the exposure during an occupation, of the army, the expensive instrument of power, to incalculable risks, which would arise from non-conventional warfare, were it to be initiated independently by the civilian population.

In the light of the importance of the Lieber Instructions reference can be made to the requirement specified in it, that the participants in the *levée en masse* must offer resistance to the enemy in great numbers. For it is from this that the will of the people appears, at least the majority thereof, to fight.¹⁷ This mass initiative is, in the absence of the requirement of further distinguishing marks, such as for example, the wearing of a uniform – in respect of which Bluntschli remarks that this is introduced on the grounds of tactics and discipline within the armies and not in order to satisfy a rule of public law¹⁸ – an indication for the adversary that he shall have to march against a population committed to resistance.

The Brussels Codification Conference of 1874¹⁹, with its striving to establish the recognised humanitarian principles in the law of war and to bring these into line with the requirement of military need, confirmed the idea of the popular resistance in the form of the *levée en masse*.²⁰ This came about primarily at the insistence of the smaller powers who had no strong military apparatus at their disposal.²¹

This appeared clearly, for example, from the statements of the Spanish delegate who referred to the tradition of his country, its geographic circumstances, the character of its inhabitants, circumstances which obliged that country to consider the defensive war as a national war, in which every able-bodied person ought to take part.²²

The "Oxford Manual", appearing in 1880²³, reiterated the admissibility of the

16. "Instructions for the Government of Armies of the United States in the Field", prepared by Francis Lieber, text in D. Schindler- J. Toman, *The Laws of Armed Conflicts*, (Leiden: Sijthoff 1973), p. 3 et seq.

17. F. Lieber, *Miscellaneous Writings*, II, Guerilla Parties considered with reference to the laws and usages of war, 1881, p. 284; see Ford op.cit., p. 54; compare also J.C. Bluntschli, *Das moderne Kriegsrecht der zivilisierten Staaten* (Nördlingen, 1874), p. 31.

18. Bluntschli, op.cit., p. 31; see also J.C.C. den Beer Poortugael, *Het Oorlogsrecht*, (1872), p. 80.

19. Brussels Conference of 1874, text see Schindler-Toman, op.cit., p. 25 et seq.

20. Art. 10, see Schindler-Toman, op.cit., p. 28.

21. Compare Ford, op.cit., p. 80 et seq.

22. See Ford, op.cit., p. 86; compare also G.J.A.D. Draper, "Combattant Status, An Historical Perspective", *Revue de Droit Penal Militaire et de Droit de la Guerre*, (1972), p. 139.

23. 'The Laws of War on Land', Manual published by the Institute of International Law (Oxford Manual), 1880, text in Schindler-Toman, op.cit., p. 35 et seq.

use of armed force in connection with the defence of freedom in the society of States and just as in the earlier codification attempts, has to recognise the involvement of the citizen with this defence. Yet this occurs with considerable reservation, which is clear from the adoption of the requirement of the open carrying of weapons²⁴ and the reiteration²⁵ of the paternalistic tone of the requirement that the resistance against the enemy must be spontaneous.

The introduction of both of these requirements means a weakening of the position of an opposing population; to wit, a non-organised spontaneous popular resistance will scarcely be able to maintain itself against a disciplined organ of power such as an army.

It can hardly be said that the Hague Peace Conferences²⁷ added essential new elements to the institution of the *levée en masse*.²⁸ During the Conferences the permissibility of the popular resistance came up for discussion between the great continental powers and the smaller powers, the latter being supported by the maritime power Great Britain.²⁹

The smaller powers again took the view that "Rien dans ce chapitre (Art. 9, 10 Brussels Conference 1874 concerning combatants) ne doit être considéré comme tendant à amoindrir ou à supprimer le droit qui appartient à la population d'un pays envahi de remplir son devoir d'opposer aux envahisseurs par tous les moyens licites, la résistance la plus énergique".³⁰

Thus we find here also a refusal to accept any curtailment of the national resistance potential. At the Hague also the attempt was made to restrain the view of the great powers who wished to classify the reversal of an occupation by means of a popular resistance as unlawful.³¹

This acceptance of resistance against aggression leads to the conclusion in the British Manual of Military Law that "The first duty of a citizen is to defend his country and provided he does so loyally he should not be treated as a marauder or criminal".³² Such a vision of the *levée en masse* makes it possible to approach the phenomenon in a flexible way and can, moreover, make a contribution to the facilitation of the regulation of a later peace.³³

24. Art. 2(4), Oxford Manual; "openly resist".

25. Art. 10 Brussels Conference 1874.

26. Art. 2(4) Oxford Manual.

27. Convention (II) with Respect to the Laws and Customs of War on Land, signed at The Hague, 29th July 1899; Convention (IV) Respecting the Laws and Customs of War on Land, signed at The Hague, 18th October 1907, text in Schindler-Toman, *op.cit.*, p. 57 et seq.

28. If one takes into consideration the Clause of De Martens new elements were added indirectly, see Conference International de la Paix, *Actes III* e partie (The Hague, 1899), p. 152.

29. *Actes III*, 1899, p. 151 et seq.; see also G. Leitolf, *Das Problem des Freischärlerkrieges auf den Haager Friedenskonferenzen*, (Würzburg: Jur.Diss., 1971), p. 210 et seq.; Ford, *op.cit.*, p. 101 et seq.

30. Ardagh, *Actes III*, 1899, p. 153, 154, see Ford, *op.cit.*, p. 105, Leitolf, *op.cit.*, p. 237.

31. Kuenzli: "Il ne pourra être exercé de représailles sur la population du territoire occupé pour avoir pris ouvertement les armes contre l'envahisseur", *Actes III*, 1899, p. 153, 154; see also Ford, *op.cit.*, p. 105; Leitolf, *op.cit.*, p. 233.

32. See Greenspan, *op.cit.*, p. 62, 63.

33. Compare Kalshoven, F., *Zwijgt het recht als de wapens spreken?* (Amsterdam: De Bezige Bij, 1974), p. 12.

II

The Geneva Conventions of 1949³⁴ repeat the provisions accepted by the majority of States half a century earlier in respect of the *levée en masse*.³⁵

The resistance situations during the Second World War, in particular in the Eastern European countries³⁶, and in associated conflicts, such as the Chinese resistance against Japan, were not regarded as originating in a popular movement directed against the invader. One saw only the "tip of the iceberg", a "tip" which consisted of the guerilla war conducted by an ideologically influenced resistance organisation.³⁸

On the other hand, the States which based their resistance on an ideological popular movement could not or would not present their views of this method of settling conflict in such a way that it could be laid down in treaty provisions. For example, the Soviet Union or the Peoples Republic of China, in the framework of the striving towards decolonisation³⁹ would have no interest in revealing the perfected system of the popular resistance⁴⁰ to a possible adversary of one of its allies.

It is true that in 1946 Trainin⁴¹, pointing out the development of the Regulations respecting the laws and customs of war on land and referring to the De Martens clause, regarded the resistance of the Soviet Union population to the German aggression also in territory which was occupied as the action of a *levée en masse*.

The discussion resulted in the formulation of Art. 4 A(2) Third Convention of Geneva of 1949 (Art. 13(2) First and Second Conventions) concerning the combatant status of resistance fighters.⁴²

34. Geneva Conventions for the Protection of War Victims of 12th August 1949, text in Schindler-Toman, op.cit., p. 289 et seq.

35. Art. 13(6) 1st. en l'Ind Convention, Art. 4A(6) 3rd Convention; see P. de la Pradelle, *La Conférence Diplomatique et les Nouvelles Conventions de Genève du 12 Août 1949* (Paris: Les Editions Internationales, 1951), p. 48 et seq.

36. Compare e.g. H. Kuehnrich, *Der Partisanenkrieg in Europa 1939-1945*, (Berlin: Dietz-Verlag, 1965).

37. Compare e.g. Mao Tse-Toung, *Problèmes stratégiques de la guerre des partisans contre le Japon* (Mai 1938, Ecrits Militaires du Mao Tse-Toung, Pekin, 1964).

38. Compare C. Schmitt, *Theorie des Partisanen*, (Berlin: Duncker und Humblot, 1963), p. 30; F.A. von der Heydte, *Der moderne Kleinkrieg*, (Würzburg: Holzner Verlag, 1972), p. 47: "Das 'klassische' Völkerrecht hat den Kleinkrieg nur als Begleiterscheinung eines grossen Krieges erfasst und ihn in den normativen Rahmen eines solchen grossen Krieges einzuordnen – und damit den für diesen Krieg geltenden Vorschriften unterzuordnen – versucht."

39. Compare W. Hahlweg, *Guerilla-Krieg ohne Fronten*, (Stuttgart, Berlin, Köln, Mainz: Kohlhammer-Verlag, 1968), p. 149 et seq; Chapt. 7: "Guerilla als bevorzugte Kampfesform bei der Emanzipation farbiger und unterentwickelter Völker".

40. For the system of the peoples' revolt see C. von Clausewitz, *Vom Kriege*; W.I. Lenin, *Partisanenkriegführung*; Mao Tse-Toung, *Problèmes stratégiques de la guerre des partisans contre le Japon*; E. Guevara, *La guerre de guérilla*; C. Marighella, *Petit manuel du guérillero urbain*.

41. J.P. Trainin, "Questions of Guerilla Warfare in the Law of War", 40 *A.J.I.L.*, (1946), p. 534 et seq.

42. Compare La Pradelle, op.cit., p. 50 et seq, p. 62.

"Eine moderne Problematik der *levée en masse*"⁴³ was not perceived and so no further attempt needed to be undertaken in respect of the *levée en masse* to reach an international regulation *de lege ferenda*.⁴⁴ It was stated⁴⁵ that the *levée en masse* itself had not occurred in the Second World War but that for traditional reasons a place should be found for this institution in the new convention.

Certainly one can agree that the *levée en masse* in its traditional form as described in Art. 2 Regulations respecting the laws and customs of war on land and in the Geneva Conventions is superseded and that "es keiner militärischen Erfahrung bedarf, um die Erhebung einer unorganisierten, primitiv bewaffneten Bevölkerung gegen eindringende Invasionstruppen als glatten Selbstmord abzuqualifizieren."⁴⁶ But does this actually mean "dass die *Levée en masse* zu jenen Erscheinungsformen der Kriegsführung zu zählen is, die im 20. Jahrhundert durch Seltenheitswert glänzen und in Anbetracht der neuzeitlichen Kampfmittel ihrem Schicksal, in Vergessenheit zu geraten, kaum entrinnen werden"?⁴⁷

On the basis of what has already been said and where reference was made to the fact that the public law community accepts the principle that the population has the right to defend its interests against an assailant, the *levée en masse* can only be considered as a reminiscence of the last century⁴⁸ when one contends that such a popular resistance may only be unorganised, spontaneous⁴⁹, carrying weapons openly and directed against an approaching enemy, and that these requirements should circumscribe the essence of the *levée en masse*.

The liberation wars of post-1949 in Asia and Africa where initially in particular France and Great Britain were confronted with the different aspects of popular resistance have led by reason of the conservative approach, e.g. the treatment of partisans as criminals⁵⁰ and by the shifting of the war aims — in this category of conflict it is not primarily a matter of the conquest of certain geographic areas but rather the "winning over" of the population⁵¹ — to setbacks

43. Schmid, op.cit., p. 136.

44. Steinkamm, op.cit., p. 240.

45. Conférence des Experts Gouvernementaux, Genève, 14-26 Avril 1947, see Ford, op. cit., p. 247 et seq., Schmid, op.cit., p. 136. La Pradelle, op.cit., p. 57.

46. Steinkamm, op.cit., p. 241.

47. Schmid, op.cit., p. 136.

48. Steinkamm, op.cit., p. 241, footnote 5.

49. See Schmid op.cit., p. 137 Ford, op.cit., p. 272 where reference is made to *Actes IIa*, 1949, p. 409 et seq. where the proposal submitted by Israel that the word "spontanément" be omitted from the Convention can be found.

50. See Schmitt, op.cit., p. 30 with reference to J.S. Pictet, *Commentaire* vol. IV (Genève: CICR, 1958), IV, p. 330: "Les actes irréguliers d'hostilité peuvent être considérés en effet comme des délits de droit commun, quelles que soient les idées qui aient inspiré leurs auteurs."

51. Compare e.g. D. Galula, *Counter-Insurgency, Warfare, Theory and Practice* (London, Dunmow: Pall Mall Press, 1964), p. 7; for a survey of the wars of liberation see e.g. Gen. A. Beaufre, *La Guerre révolutionnaire, les formes nouvelles de la guerre* (Paris: Fayard, 1972), p. 123 et seq; G. Fairbairn, *Revolutionary Guerilla Warfare, The Countryside Version* (Harmondsworth: Penguin Books, 1974), p. 125 et seq.

for the colonial powers, which however opened the way to an analysis of this form of total confrontation.⁵²

This showed also the close connection between the action of partisans and the activities of the *levée en masse* as possibly substituting for, supplementing or developing into each other's form of warfare, of which use can be made on the basis of the assessment of the concrete military situation.⁵³ The insights of the military were not, however, transposed to the sphere of the law of war.

The resolutions of the United Nations as expression of the views of the community of nations⁵⁴ confirm the struggle for self-determination as a fundamental human right⁵⁵ without hereto excluding the use of armed force.⁵⁶ The Red Cross Conferences which were convened to confirm and further develop the Geneva Conventions of 1949⁵⁷ also emphasise this right of self-determination by qualifying the use of necessary force to obtain this objective⁵⁸ as an international armed conflict in the sense of the common Art. 2 of the Geneva Conventions.⁵⁹ This implies that hereby the means and forms of warfare, which are employed by those who aim at independence and equality, must also be recognised.⁶⁰ As a consequence thereof fighters for such self-determination who are taken as prisoners must be considered as prisoners of war and treated accordingly⁶¹ so as to implement the basic rule of the law of war that the vanquished adversary must be treated humanely.

This approach at the same time removes the participant in the war of liberation from the criminal sphere, that is to say, he can no longer by reason only of his part in the resistance automatically be characterised as a criminal, guilty of the "Rebarbarisierung" of the war⁶²; rather he is put on a par with that

52. See e.g. Un Groupe d'officiers, "La guerre du Vieth-Minh", 282 *Revue Militaire d'Information*, (1957), p. 25 et seq.; A. Souyris, "Les conditions de la parade et de riposte à la guerre révolutionnaire", 282 *RMI*, p. 91 et seq.; Ximenes, "La guerre révolutionnaire et ses données fondamentales", 281 *RMI*, p. 9 et seq.

53. Guevara, op.cit., p. 23.

54. See A.J.P. Tammes, *Internationaal Publiekrecht*. (Amsterdam: De Erven Bohn, 1973), pp. 33, 34.

55. See United Nations, *United Nations Action in the Field of Human Rights*, (1974 E.74. XIV. 2), p. 24 et seq.

56. Compare the attempts of the U.N. since 1968 to achieve an improvement of the law applicable during armed conflicts, United Nations, E.74. XIV.2, p. 110 et seq.

57. Compare: Comité International de la Croix-Rouge, *Conférence d'experts gouvernementaux sur la réaffirmation et le développement du droit international applicable dans les conflits armés, Seconde Session, 3 mai-3 juin 1972, Rapport sur les travaux de la Conférence*, Vol. I (Genève: 1972), p. 1.

58. CICR, *Rapport*, I, p. 28: "Les luttes armées pour l'autodétermination".

59. See CICR, *Rapport*, I, p. 28.

60. It is assumed that the *ius in bello* is applicable irrespective of the *causa* of the conflict.

61. Compare Kalshoven, op.cit., p. 31; F. Münch, "Tätigkeit der Vereinten Nationen in völkerrechtlichen Fragen, 1.1. 1972-31.12.1973", *Archiv des Völkerrechts*, (1975), p. 305.

62. Münch, op.cit., p. 305.

section of the population which, not being in a position to participate in the resistance, is entitled to protection.

The essence of the war of liberation by means of the popular resistance lies, as already indicated, in the mobilisation of all the forces at the disposal of the community. —“It is therefore the people as a whole who revolt and struggle as a “nation-class” against colonial oppression and who win independence.”⁶³ — This aim can only be realised by the organising of a system of task division which in principle concerns everybody in the war effort.⁶⁴ This depending upon the situation and phase of the hostilities, can change its nature.⁶⁵

On the basis of this data one can divide the population of the area striving towards independence into those who are capable of making a contribution to the effort and those who do not have such a possibility.⁶⁶ In respect of those participants in the popular resistance who apply guerilla warfare as a means to restrain the adversary, the International Committee of the Red Cross has undertaken the attempt to revise the provision of Art. 4(A)2 Third Convention of Geneva (Art. 13(2) First and Second Convention) in such a way that this is reconciled with the guerilla situation of the popular resistance.⁶⁷ Yet the rule of Art. 42(1)b of the Draft Protocol saying that the participants in organised resistance movements must distinguish themselves from the civilian population during military activities can not yet —depending on the phase of the partisan war— be reconciled with the reality of the popular resistance.⁶⁸ This is underlined by the non-adaptation of the provision concerning the *levée en masse* to the present practice of the popular resistance, although the questions concerning warfare by partisans or by a *levée en masse* must be seen as components of the same problem.⁶⁹

This conception of the indivisibility of the popular resistance is laid down in the Yugoslav law on the popular defence⁷⁰ in which it is concretised that every citizen as a consequence of his “Selbstverwaltungsfähigkeit” has not only a duty

63. Kwame Nkrumah, *Handbook of Revolutionary Warfare*, (New York: International Publishers, 1968), p. 25.

64. Compare Nkrumah, op.cit., p. 75 et seq., 121.

65. See Mao Tse-Toung, op.cit., Chapt. VIII.

66. In this connection no attention is paid to those individuals who collaborate with the enemy, compare Mao Tse-Toung, op.cit., p. 195.

67. International Committee of the Red Cross (ICRC), *Draft Additional Protocols to the Geneva Conventions of August 12, 1949* (Geneva: ICRC, 1973), Art. 42.

68. Another view e.g. I. Seidl-Hohenveldern, “Befreiungskriege und Neutralität”, *Festschrift Manlio Udina* (1975) but with reference to footnote 26, 27; Chaumont, “La recherche d’un critère pour l’intégration de la guérilla au droit international humanitaire contemporain”, *Mélanges offerts à Ch. Rousseau*, (1974), p. 43 et seq., Farer (ed.), “The Laws of War — 25 Years after Nuremberg”, 583 *International Conciliation*, (1971), pp. 41-43. Compare also Kalshoven op. cit., p. 90; In my opinion the attempt of the ICRC is related to the means of warfare of the industrial countries and pays insufficient attention to the substantive possibilities of the liberation movements.

69. See Mao Tse-Toung, op.cit., Chapt. VIII.

70. German Text: Das Gesetz über die Volksverteidigung und das Gesetz über die Wehrpflicht, Belgrad 1969, *Osteuropa-Archiv*, (Januar 1971), p. A 54 et seq.

but also a right to defend himself.⁷¹ This vision, resulting from the partisans' experiences during the Second World War⁷², based on political and military premises⁷³, leads to the conception of the general civil defence⁷⁴ during which the participants under all circumstances remain bound by the rules of war.⁷⁵

III

This contemporary acceptance of the institution of the *levée en masse* presented here, also in occupied territory⁷⁶, contains at the same time the obligation to make more attempts to arrive at an adequate regulation of this institution in public law terms. In supplementation to the provisions concerning the establishment of the combatant status of partisans⁷⁷ and working from the conception that the popular resistance in its present form is acknowledged as an admissible means of warfare, the *levée en masse* should be so defined that the participants in this popular resistance are regarded as combatants. This means that the live-bound, historical requirements of Art. 2 of the Regulations respecting the laws and customs of war on land and Art. 4A(6) Third Convention of Geneva of 1949 (Art. 13(6) First and Second Conventions) – the open carrying of weapons, spontaneity and non-organisation, together with the prohibition of resistance in occupied territory no longer hold good and must be replaced by more general wording. In respect of Art. 2 Regulations respecting the laws and customs of war on land such an altered text could read as follows:

“The inhabitants of a territory who take up arms in order to exercise their right to self-determination and national independence or to repel invasion, shall be considered as a belligerent, if they respect the laws and customs of warfare.”

For Art. 4(A)6 Third Convention of Geneva 1949 (Art. 13(6) First and Second Convention) this would mean the following alteration:

“Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories who have fallen into the power of the enemy:
... 6. Inhabitants of a territory, who take up arms in order to exercise their right to self-determination and national independence or to resist invasion, provided they respect the laws and customs of war.”

71. Das Gesetz über die Volksverteidigung, Einführungsbestimmungen I: “Das Sozialistische Jugoslawien bereitet sich auf eine allgemeine Volksverteidigung vor.”

72. Compare e.g. Beaufre, op.cit., p. 201 et seq.

73. Das Gesetz über die Volksverteidigung, Einführungsbestimmungen.

74. Das Gesetz über die Volksverteidigung, Art. 1.

75. Das Gesetz über die Volksverteidigung, Einführungsbestimmungen III.

76. Das Gesetz über die Volksverteidigung, Art. 84.

77. That is to say the application of these provisions without the requirement of the carrying of weapons openly and the presence of visible identification, Art. 4 A 2 IIIrd Convention 1949, or of the requirement of Art. 42(1b) Draft Add.-Protoc., 1973 “that they distinguish themselves from the civilian population in military operation”; see footnote 68.

It must be recognised, however, that the revisions suggested here relating to the definition of the *levée en masse* promote the already noted blurring of the classic distinction⁷⁸ between combatants and the peaceful civilian population. This in no way means that any of the humanitarian principles realised in the law of war can be abandoned.⁷⁹ In connection with the *levée en masse*, protection for those persons who are not in a position to make a contribution to the popular resistance could be found in the development and strengthening of the institutions of the undefended place and the neutralised zone.⁸⁰

78. See L. Nurick, "The Distinction between Combatant and Non-Combatant in the Law of War", *AJIL* (1945), p. 682; v.d. Heydte, *op.cit.*, p. 81 et seq., where he discusses "Der Krieg der verwischten Konturen"; on this problem see also: F. Kalshoven *The Laws of Warfare* (Leiden: Sijthoff, 1973), p. 36 et seq.

79. Compare La Pradelle, *op.cit.*, p. 36: "Inter arma caritas: Indifférente à la technique de la guerre l'oeuvre de Genève est entièrement attachée à perfectionner les méthodes et les moyens de la charité."

80. Compare e.g. art. 25 Hague Regulations Respecting the Laws and Customs of War on Land, 1899/1907, art. 1 Convention Concerning Bombardment by Naval Forces in Time of War, 1907; Art. 14 et seq. Fourth Geneva Convention 1949; Berber, II, *op.cit.*, p. 119 et seq.